No. ___ 06-1[illegible] 2007

IN THE

Supreme Court of the United States

SERGES JACQUES DESCENT
a.k.a. Jack Descent,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

SERGES JACQUES DESCENT
FCC Coleman Low
P.O. Box 1031
Coleman, Florida 33521-1031
(813) 744-5101

Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

1. To resolve the conflict between the Appellate Circuits in which the Eleventh Circuit Court of Appeals is the only circuit that limits the tendering of a motion to "Recall a Mandate" filed more than a year after issuance of a mandate unless the Movant first establishes "good cause" for the delay in filing the motion.

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UNITED STATES OF AMERICA,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, SERGES JACQUES DESCENT ("Mr. Descent"), respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on February 16, 2007.

OPINION BELOW

The unpublished opinion of the Eleventh Circuit Court of Appeals denying Appellant's *pro se* "Motion to Recall and Amend Mandate issued on February 16, 2007, is reproduced in Appendix A hereto.

JURISDICTION

The Court's jurisdiction is invoked pursuant to Title 28 U.S.C. §1254(1). This petition presents this Court with a serious constitutional question as well as a conflict with decisions of the federal appellate and circuit courts as more fully presented below. The question to be resolved centers around whether the Eleventh Circuit's Appellate Rule 41-1(c) is unconstitutional. The instant petition is timely filed and within the 90-day statutory time limitation period.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION: FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION: FIFTH AMENDMENT

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULE OF CIVIL PROCEDURE 59(e)

Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of judgment.

ELEVENTH CIRCUIT APPELLATE RULE 41-1

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) When a motion to recall is tendered for filing more than one year after issuance of the mandate, the clerk shall not accept the motion for filing unless the motion states with specificity why it was not filed sooner. The court will not grant the motion unless the movant has established good cause for the delay in filing the motion.

STATEMENT OF CASE

I. Procedural History.

On November 21, 2000, a federal grand jury in Tampa, Florida, returned a superseding indictment charging Mr. Descent with one count of conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. §371; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. §1956(h); twenty-six counts of mail fraud, in violation of 18 U.S.C. §§1341, 2326 and 2; twenty-four counts of money laundering, in violation of 18 U.S.C. §1957; and five counts of money laundering, in violation of 18 U.S.C. §1956.

On August 7, 2001, the district court sentenced Mr. Descent to serve a total of 120 months' imprisonment, three years supervised release and pay restoration in the amount of $1,512,774.81.

On May 28, 2002, the Appellate Court entered a published decision affirming Mr. Descent's convictions. *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002), *cert denied*, 537 U.S. 1132 (Jan 13, 2003). The appellate court found, however, that the district court erred in modifying the jury instructions related to the forfeiture, and vacated and remanded the case for entry of a new forfeiture judgment in the lower amount of $1,288,140.00.

On June 18, 2002, the district court issued a new judgment by reducing the amount of forfeiture to $1,288,140.00 without holding a new sentencing hearing.

On January 24, 2007, Mr. Descent filed a "Motion to Recall and Amend Mandate" (see: *Appendix B* hereto) showing that the new forfeiture amount ordered by the Appellate Court placed him in a different Sentencing Guideline range, which would have required Mr. Descent to be sentenced to a lower offense level.

On February 16, 2007, in a one judge decision, Mr. Descent was denied his motion to recall the mandate for failure to present a "good reason why the Court should accept the motion."

On March 5, 2007, Mr. Descent timely filed a motion to alter, amend or correct order pursuant to Federal Rule of Civil Procedure 59(e) and was returned to him the following day unfiled. (See: *Appendix C* hereto).

II. Facts.

During the course of Mr. Descent's Sentencing Proceedings, his attorney vehemently argued the forfeiture amount in question, asseverating that an amount of $400,000 should not be incorporated into the forfeiture amount. Additionally, Mr. Descent petitioned the court for leniency as the forfeiture amount of $1,688,845 was $100,000 over the threshold of $1,500,000 which would add one more level to his Base Offense Level. However, the Sentencing Court departed from these arguments and sentenced Mr. Descent with a Base Offense Level of 30. (By applying the 2000 Sentencing Guidelines, a forfeiture amount more than $1,500,000 and less than $2,500,000 promulgates a B.O.L 30).

In raising this issue on direct appeal, the Appellate Court found that the district court erred in modifying the jury instructions related to the forfeiture, and vacated and

remanded the case for entry of a new forfeiture judgment in the amount of $1,288,140.00.

While readdressing this issue on Mr. Descent's §2255 motion to vacate, set aside or correct sentence, Mr. Descent received correspondence from the U.S. Government advising him that his request for a treaty transfer was being hindered by his §2255 motion, and that he should be vacant of any open court activity to proceed.

Mr. Descent, acting under the language of this correspondence, filed a motion in the District Court to withdraw his habeas claims based on this information regarding his treaty transfer, which was subsequently granted and his motion under §2255 was dismissed. Unfortunately, time revealed that Mr. Descent's treaty transfer was denied.

Mr. Descent then proceeded in the Eleventh Circuit for relief pursuant to Circuit Rule 41-1(b), which Judge Cox denied and refused to entertain his motion under F.R.Civ.P. 59(e). The instant petition followed, seeking this Court's intervention in order to resolve the split amongst the federal circuit courts on the aforementioned question of law as to needing "good cause" pursuant to Circuit Rule 41-1(c) before a motion to "Recall a Mandate" can be heard in the Eleventh Circuit.

REASON FOR GRANTING PETITION

The Petitioner, Mr. Descent, respectfully submits that the Eleventh Circuits' holding that his Motion to Recall and Amend Mandate presented "no good reason why the Court should accept the motion" pursuant to Rule 41-1(c) is unconstitutional, and was wrongly applied in this case as well as creating a definitive split amongst the federal circuit courts. The federal Appellate Rules do not address the requirements for recalling a mandate under its Rule 41.

Accordingly, the Eleventh Circuit is relying on its Circuit Rule 41-1(c) as the basis for their decision which states that "the clerk shall not accept a motion to recall a mandate over a year after issuance unless the movant can show good cause for the delay." However, the eleven remaining sister circuits do not impose this same burden within their rules, and for good reason. Imposition of such a burden limits meaningful access to the courts which would be repugnant to the First Amendment of the Constitution. Access to the courts is clearly a constitutional right, grounded in the First Amendment; the Article IV Privileges and Immunities Clause, the Fifth Amendment; and/or the Fourteenth Amendment. (See: *Christopher v. Harbury*, 536 U.S. 403, 415 n.12, 153 L.Ed.2d 413, 122 S.Ct. 2179 (2002) (noting the Supreme Court's past reliance on all of these bases.))

"The clearest reason for recall or revisitation appellate mandate is to exercise the court's power to recall its mandate—at any time—to correct clerical mistakes, or to make the judgment consistent with the opinion." *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277 (CADC, 1979); *Kinnear-Weed Corp. v. Humble Oil*, 296 F.2d 215 (5th Cir. 1961); cf. *Klapprott v. United States*, 335 U.S. 601, 616, judgment modified, 336 U.S. 942 (1949). More importantly, however, the recall of an appellate mandate is to avoid an injustice. "The recall of an appellate mandate to avoid injustice is a continuation in the appellate sphere, of a deeply rooted equity jurisprudence." *Greater*, 463 F.2d at 279.

It has been long held that "[a] mandate once issued will not be recalled except by order of the court for good cause shown" and that the "good cause" requisite for recall of mandate "is the showing of need to avoid injustice,[1]" without any indication of a time limit for filing.

---

[1] *In re Union Nacional de Trabajodores*, 527 F.2d 602, 604 (1st Cir. 1975); *Calloway v. Marvel Entertainment Group, Div. of Cadence Indus.*

When you juxtapose caselaw and court rules from all the circuits it becomes pellucid that the Eleventh Circuit stands alone when they seek first to establish if your claim is within a certain time period rather than looking directly at the merits to see if there was any element of "injustice" presented at all.

This lack of uniformity in the law and procedure as applied to criminal defendants is a matter which deserves the attention of and resolution by this Court—Nothing less.

Moreover, when Mr. Descent was denied his motion, he timely filed a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), which contained a statement "with specificity why it was not filed sooner" as required under Eleventh Circuit Rule 41-1(c), but was promptly returned by the Circuit Court "unfiled" and the Court refused to entertain it.

Such an action as this clearly violated Mr. Descent's right of due process under the Fifth Amendment and his right to petition the Court for a redress of grievances.

In *Simmons v. Edmondson*, 2006 U.S. Dist. LEXIS 75127 (11th Dist. 2006); *United States v. Battle*, 272 F.Supp.2d 1354, 1357 (N.D. Ga. 2003), it was held that:

> A party may seek relief from a judgment pursuant to either Fed.R.Civ.P. 59(e) or Fed.R.Civ.P. 60(b). A "motion to alter or amend a judgment shall be filed no later than 10 days after the entry of judgment." Fed.R.Civ.P. 59(e). "The courts have delineated three major grounds

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Corp., 854 F.2d 1452, 1476 (2nd Cir. 1988); *Michael v. Horn*, 144 Fed. Appx. 260 (3rd Cir. 2005); *Faulkner v. Jones*, 66 F.3d 661, 663 (4th Cir. 1995); *Gradsky v. United States*, 376 F.2d 993, 995 (5th Cir. 1967); *Hines v. Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958); *Burns v. Clark*, 130 F.3d 782, fn.2 (7th Cir. 1997); *Ruiz v. Norris*, 104 F.3d 164 (8th Cir. 1997); *Thompson v. Calderon*, 120 F.3d 1045, 1048 (9th Cir. 1997); *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277 (D.C.C., 1971).

> justifying [pursuant to Rule 59(e)]: (1) an intervening change in controlling law; (2) the availability of new evidence; [or] (3) the need to correct clear error or prevent manifest injustice."

Mr. Descent met this criteria by satisfying the third prong as his motion showed that he was sentenced 18 months over that which he was adjudicated on. Therefore, it is axiomatic that the court should have considered his claim. Unfortunately, this was not the case. Because Mr. Descent was denied to proceed pursuant to F.R.Civ.P. 59(e), it has caused him actual injury, as the lack of access has hindered his efforts to pursue a legal claim. (See: *Lewis v. Casey*, 518 U.S. 343, 349-51 (1996)).

"The right of access to the courts is founded in the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolf v. McDonnell*, 418 U.S. 539, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974), at 941.

Additionally, the right to petition for "redress of grievances is among most precious of liberties safeguarded by Bill of Rights and this right is intimately connected, both in origin and in purpose, with other First Amendment rights of free speech and free press." *United Mine Workers v. Illinois State Bar Ass'n*, (1967) 389 U.S. 217, 19 L.Ed.2d 426, 88 S.Ct. 353.

Clearly, Mr. Descent asserts that the Court's refusal to file his motion under F.R.Civ.P. 59(e) severely undermined his right to due process. From a tradition beginning with King John at Runnymede down to and including the Honorable George Dunbar Prewitt of Greenville, Mississippi, our American notions of simple fairness, not to mention constitutional mandates of due process, dictate that *every* man is entitled to due process of law—even a man with poor

judgment, a vexatious tongue and a venomous quill." *In re Prewitt*, 280 F.Supp.2d 548, 557 (5th Dist. 2003).

In sum, Petitioner asseverates that Eleventh Circuit's Rule 41-1(c) suffocates his constitutional rights to seek redress and access to the courts, by imposing a one-year time limitation unless the movant has established "good cause" for the delay in filing the motion. In *Carrington v. United States*, 470 F.3d 920 (9th Cir. 2006), defendant Carrington was sentenced in 1990 to 324 months for drug-trafficking offenses, the district court described the Sentencing Guidelines as "bad law," and expressed frustration with the limitation on the court's discretion imposed by the Guidelines. When defendant Tillitz was sentenced in 1998 to 360 months for drug-trafficking crimes, the same district court judge noted that he had ruled the Guidelines unconstitutional when they were first promulgated but that the Supreme Court had overturned that ruling. Both sentences were upheld on appeal. In 2005, after the decision in *U.S. v. Booker*, 543 U.S. 220 (2005), Tillitz filed a petition for a writ of *audita querela* seeking relief from his sentence, and Carrington moved for modification of his sentence. The sentencing district court judge denied both motions, but asked the court of appeals to recall its mandates so that the court could resentence the defendants. The Ninth Circuit held that the two cases presented "extraordinary circumstances" that justified recall of the court's mandates from the defendants' earlier appeals so that the district court could resentence the defendants.

Using *Carrington* as an example, a showing of good cause was made and, sixteen (16) years later, the court recalled its mandate so the defendants could be resentenced. Likewise, Mr. Descent should have received the same considerations as Carrington.

Moreover, it would be safe to draw an inference that had Petitioner been in the Ninth Circuit (or any other circuit for that matter) his motion would have been more efficacious

than that of the Eleventh Circuit. Petitioner additionally recapitulates that his denial to submit relief under Fed.R.Civ.P. 59(e) was in violation of the Due Process Clause of the Fifth Amendment.

Under these circumstances, review is necessary by this Court to resolve this split between the Eleventh Circuit and the other sister circuits as to "limiting" the time in which to file a motion to Recall a Mandate. As noted, the Federal Appellate Rules do not limit when a motion to recall a mandate must be filed into court. Mr. Descent seeks relief from this Court and asks for a ruling that the Eleventh Circuit Rule 41-1(c) be held unconstitutional and that the Appellate Court recall its mandate, so that he may be resentenced consistent with the new forfeiture amount.

CONCLUSION

WHEREFORE, the Petitioner, SERGES JACQUES DESCENT, requests this Court to grant the instant petition for writ of certiorari, declare the Eleventh Circuit Rule 41-1(c) unconstitutional, and the Appellate Court recall its mandate so that Petitioner may be resentenced consistent with the new forfeiture amount. Mr. Descent further requests other relief this Court deems proper and just.

Respectfully submitted,

SERGES JACQUES DESCENT
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Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed FEB. 16, 2007]

01-14735-EE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SERGES JACQUES DESCENT,
a.k.a. Jack Descent,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ORDER:

The Court issued its mandate in this appeal on June 26, 2002. Appellant's *pro se* "Motion to Recall and Amend Mandate" presents no good reason why the Court should accept the motion for filing in this long-closed appeal. The Clerk is directed to return the "Motion to Recall and Amend Mandate" unfiled and to accept no further filings in this appeal.

/s/ [Illegible]
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed JAN. 24, 2007]

No. 01-14735-EE

SERGES JACQUES DESCENT,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

MOTION TO RECALL AND AMEND MANDATE

COMES NOW, the Petitioner-Appellant, SERGES JACQUES DESCENT, pro se, hereinafter known as "Mr. Descent" or "Petitioner," pursuant to Eleventh Circuit Rule 41-1(b), and submits this "Motion to Recall and Amend Mandate" regarding the above referenced case number in which was decided on May 28, 2002, and states as follows:

REASON FOR LATENESS PURSUANT TO
11th Cir. 41-1(c)

On direct appeal, this Court found that the district court erred in modifying the jury instructions related to forfeiture, and vacated and remanded the case for entry of a new forfeiture amount of $1,288,140.00. Mr. Descent asseverates that he has exhausted all remedies that was available to him. Mr. Descent diligently sought relief via Title 28, Sections 2255 and 2241. Mr. Descent realized that when this Honorable Court remanded his case for a lower forfeiture amount, this action ultimately placed him in a lower sentencing category. Mr. Descent further acknowledges that

while he was aware of a sentencing error, he was not aware that the Eleventh Circuit would require a showing of good cause in order to recall its mandate after the expiration of a one (1) year time limit of its issuance.

Additionally, Mr. Descent is not relying on this motion as a vehicle to circumvent other procedures; nor is he asking that negligence of the law be a determining factor of good cause. Mr. Descent is asking that this Court to view the facts as a whole, resting on the grounds of the need to avoid injustice.

THE GOOD CAUSE REQUISITE

In Greater Boston Television Corp. v. FCC, 149 U.S. App. D.C. 322, 463 F.2d 268,277 (CADC, 1971) the court expounded that "[i]n the absence of express provision on recall of appellate mandate, in either FRAP or the Rules of our court, we turn to general doctrine. In our view that doctrine has the same content as the rule of court discussed in *Hines v. Royal Indemnity Co.*, 253 f.2d 111,114 (6th Cir. 1958); 'A mandate once issued will not be recalled except by order of the court for good cause shown.' The 'good cause' requisite for recall of mandate is the showing of need to avoid injustice." (emphasis added).

This doctrine in in parallel to Mr. Descent's case at bar as the forfeiture amount was the determining factor of the appropriate guideline range. In essence, Mr. Descent has been prejudiced as the new forfeiture amount changed his guideline range, thereby manifesting an injustice as Mr. Descent is now being punished beyond the guideline range that he was adjudicated on.

RELIEF SOUGHT

Petitioner prays that this Honorable Court will recall its mandate and amend it to be remanded for resentencing to be consistent with the new forfeiture amount.

I. Statement of Case

On November 21, 2000, a federal grand jury in Tampa, Florida, returned a superseding indictment charging Mr. Descent with one count of conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. Section 371; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. Section 1956(h); twenty-six counts of mail fraud, in violation of 18 U.S.C. Sections 1341, 2326 and 2; twenty-four counts of money laundering, in violation of 18 U.S.C. Section 1957; and five counts of money laundering, in violation of 18 U.S.C. Section 1956.

On August 7, 2001, the district court sentenced Mr. Descent to serve a total of 120 months' imprisonment, three years supervised release and pay restoration in the amount of $1,512,774.81. On May 28, 2002, the Appellate Court entered a decision affirming Mr. Descent's convictions. *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002), *cert. denied*, 537 U.S. 1132 (Jan. 13, 2003). The appellate court found, however, that the district court erred in modifying the jury instructions related to the forfeiture, and vacated and remanded the case for entry of a new forfeiture judgment in the amount of $1,288,140.00.

II. Argument

During the course of Mr. Descent's Sentencing Proceedings, his attorney vehemently argued the forfeiture amount in question, asseverating that an amount of $400,000 should not be incorporated into the forfeiture amount. Additionally, Mr. Descent petitioned the court for leniency as the forfeiture amount of $1,688,845 was $100,000 over the threshold of $1,500,000 which would add one more level to his Base Offense Level. (By applying the sentencing guidelines [2000], more than $1,500,000 and less than $2,500,000 would subject Mr. Descent to one more level in his offense level. (U.S.S.G. 2F1.1)).

During objections, Mr. Descent's attorney stated:

"MR. FELDMAN: There is a range there of a loss of 1.5 million to 2.5 million that is treated the same. He's just $100,000 over into the next category. So he's being treated the same way as if he committed a $2.5 million fraud instead of a $1.6 million fraud."

"THE COURT: That would be one point difference. What difference would that have made in the guidelines?"

"MR. FELDMAN: It would make a one-level difference in the guidelines."

"THE COURT: Which is what?"

"MR. FELDMAN: So we'd be at 29, rather than 30."

"THE COURT: Which is what?"

"MR. FELDMAN: A 29 is 87 to 108 months. So it is roughly ten months difference on the low end and something greater than that on the high end." R71:22-72:11.

This was not the only time this subject was addressed. In the Sentencing Proceedings from R7:24 to R81-13, the following was addressed:

"THE COURT: Is one and a half million some sort of cutoff on the guidelines?"

"MR. FELDMAN: Let me check—there is a—there is a difference in the range. Let me—I'm not sure exactly where the cutoff is."

"MR. MONK: [AUSA] There is."

"MR. FELDMAN: Is it 1.5?"

"MR. MONK: Yes."

"THE COURT: What's the difference in the range?"

"MR. MONK: One level."

"THE COURT: One level? Okay."

The crux of this uncovers the fact that when his judgment was overturned, his case was remanded with instructions to enter a new forfeiture judgment in the amount of $1,288,140, which also would have placed Mr. Descent in a different base level sentencing category, as he is now under the $1,500,000 guideline range.

As Mr. Descent has shown this Honorable Court, it is axiomatic that the district court acknowledged that a lower forefeiture amount would award him a one-level adjustment. The Sentencing Court determined that the applicable guidelines are a Total Offense Level 30, Criminal History Category I. (R69:17-19).

If you were to juxtapose this case at bar with *Estate of Lisle v. Comm'r*, 431 F.3d 439 (5th Cir. 2006) you can see a relationship as the Fifth Circuit granted and recalled its mandate, identifying the unusual circumstances and to preserve 'the interest of fairness', and to prevent possible injustice.

In *Malik v. Brown*, 65 F.3d 148; 1995 U.S. App. LEXIS 25258 (9th Cir. 1995), it came to the attention of the court that Congress adopted the Religious Freedom Restoration Act (RFRA) prior to the date their opinion was filed. And, "RFRA was not called to our attention by the parties in a post-filing petition. Our research did not disclose its existence prior to filing." Upon this information the court recalled its mandate.

Likewise, *Brown* makes a reflection to the degree that at the time this Court rendered its decision, the issue was not presented that this would ultimately place Mr. Descent into a different guideline range.

III. Conclusion

WHEREFORE, in light of the aforementioned and in the interests of justice, Mr. Descent respectfully prays this Honorable Court to grant the Motion To Recall and Amend Man-

date, and remand with instructions to resentence Mr. Descent from 120 months to a comparable sentence of 107 months (using a Base Offense Level 29, Criminal History Category I), and any other relief this Court deems proper and just.

Respectfully submitted,

/s/ Serges Jacques Descent
SERGES JACQUES DESCENT
USM# 39101-018
FCC Coleman Low
P.O. Box 1931
Coleman, FL 33521-1031

Dated: 01/22/2007.

APPENDIX C

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

March 06, 2007

Serges Jacques Descent
Coleman FCI-Low
PO BOX 1031
COLEMAN FL 33521-1031

Appeal Number: 01-14735-EE
Case Style: *USA v. Serges Jacques Descent*
District Court Number: 00-00186 CR-T-30

The following action has been taken in the referenced case:

Per the order dated 2/16/07, the clerk is directed to accept no further filings in this appeal. Therefore, enclosed please find your motion for reconsideration returned unfiled.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Brenda Wiegmam (404) 335-6174

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Mar. 5, 2007]

01-14735-EE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SERGES JACQUES DESCENT, a.k.a. Jack Descent,
Defendant-Appellant.

SERGES JACQUES DESCENT'S Fed.R.Civ.P.59(e) Motion To Alter, Amend, or Correct Order Denying Motion to Recall And Amend Mandate and Memorandum of Law in Support Thereof

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COMES NOW, the Defendant-Appellant, SERGES JACQUES DESCENT, hereinafter known as "Mr. Descent" or "Appellant," in the above entitled numbered cause who files this, his Fed.R.Civ.P.59(e) Motion to alter, amend or correct this Court's order denying Motion to Recall and Amend Mandate, and in support thereof states as follows:

I. INTRODUCTION

On August 7, 2001, the district court sentenced Mr. Descent to serve a total of 120 months imprisonment, three years supervised release and pay restitution in the amount of $1,512,774.81. On May 28, 2002, the Appellate Court entered a decision affirming Mr. Descent's convictions. *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002), *cert. denied*, 537 U.S. 1132 (Jan 13, 2003). This Court found, however, that the

district court erred in modifying the jury instructions related to the forfeiture, and vacated and remanded the case for entry of a new forfeiture judgment in the amount of $1,288,140.00.

On January 24, 2007, Mr. Descent filed a Motion to Recall and Amend Mandate because when the forfeiture judgment was corrected, that action ultimately placed him in a different sentencing category (i.e., from level 30 to level 29). On February 16, 2007, this Court entered an order denying Mr. Descent's motion to Amend and Recall Mandate, stating that no good reason was presented. In so doing, this Court held:

> This Court issued its mandate in this appeals on June 26, 2002. Appellant's *pro se* "Motion to Recall and Amend Mandate" presents no good reason why the court should accept the motion for filing in this long-closed appeal. The Clerk is directed to return the "Motion to Recall and Amend Mandate" unfiled and to accept no further filings in this appeal.

ORDER, dated 2/16/2007, at p.1

Mr. Descent now moves this Court for reconsideration of its order pursuant to Fed.R.Civ.P.59(e). Mr. Descent respectfully submits that good reason was shown for this Court to re-open this long-closed appeal and to correct the mandate as a matter of law.

II. LEGAL DISCUSSION

Mr. Descent moves this Court to alter, amend or correct its order denying his motion to Recall and Amend Mandate for presenting no good reason. This motion is sanctioned under Federal Rules of Civil Procedure 59(e).

A. Fed.R.Civ.P.59(e)—The Law.

A motion to alter or amend a judgment pursuant to Fed.R.Civ.P.59(e) must be filed with the clerk of the court within ten (10) days after entry of judgment. See: Fed.R.Civ.P.59(e); *Jones v. UNIM Life Ins. Co.*, 223 F.3d

130, 136 (2nd Cir. 2000). The ten day deadline under Rule 59(e) is jurisdictional and may not be extended by waiver, agreement of the parties or by the court. Fed.R.Civ.P.6(a); *U.S. Leather, Inc. v. H&W Partnership*, 60 F.3d 222, 225 (5th Cir. 1995); *Hope v. United States*, 43 F.3d 1140, 1143 (7th Cir. 1994).

There are three grounds for amending a judgment, one of which is to correct a clear error of law or to present manifest injustice. *Servants of PAcaclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). When a party filed a motion under Rule 59(e) showing that judgment contains a clear error of law, the district court should resolve the issue by granting the motion. *See, e.g., Collision v. International Chem. Workers Un. Local 217*, 34 F.3d 233, 238 (4th Cir. 1994); *Russell v. Delco Remy*, 51 F.3d 746, 749 (7th Cir. 1995). The same is true of an order on a clear factual error. *Norman v. Arkansas Dept. of Educ.*, 70 F.3d 748, 750 (8th Cir. 1996).

A. THE REQUISITE OF GOOD REASON WHY THIS COURT SHOULD ACCEPT THIS MOTION.

1. INJUSTICE. Mr. Descent asseverates that he was prejudiced as this Court did not consider Appellant's "good cause" showing of an injustice that needs to be prevented by recalling the mandate.

Black's Law Dictionary defines "injustice" as "1. An unjust state of affairs; unfairness. 2. An unjust act." *Black's Law Dictionary,* Eighth Edition, p.802. Mr. Descent adduced in his motion to recall the mandate that when this Court vacated and remanded the case for entry of a new forfeiture judgment in the amount of $1,288,140.00, it moved him to a different Sentencing Level resultant of this Court's decision. (See: *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002) May 28, 2002).

In *Greater Boston Television Corp. v. FCC*, 149 U.S. App. D.C. 322, 463 F.2d 268, 277 (CADC, 1971), the court expounded that "[i]n the absence of express provision on recall of appellate mandate, in either FRAP or the Rules of our court, we turn to general doctrine. In our view that doctrine has the same content as the rule of court discussed in *Hines v. Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958); 'A mandate once issued will not be recalled except by order of the court for good cause shown.' The 'good cause' requisite for a recall of mandate is the showing of a need to avoid injustice."

Mr. Descent was sentenced to 120 months incarceration on August 7, 2001. This was predicated on his original forfeiture judgment of $1,512,774.84, which, in accordance with the Sentencing Guidelines [2002], places him at Level 30, Category I (97 to 121 months). This Court on May 28, 2002, vacated Mr. Descent's Judgment and remanded the case to the district court to enter a new forfeiture judgment in the amount of $1,288,140.00.

Using the same Guidelines to apply the new forfeiture judgment of $1,288,140.00 also moves the Appellant from Level 30 to Level 29 (87 to 108 months).

When Mr.. Descent was resentenced, the lower court failed to apply the variance in the levels to be consistent with this Court's order. As a result of this injustice, Mr. Descent is serving 18 months over that which he was adjudicated on, as it is axiomatic that the Appellant should have been resentenced within the scope of 87 to 108 months.

This case is analogous to *Estate of Lisle v. Comm'r*, 431 F.3d 439 (5th Cir. 2006), where the Fifth Circuit has recalled its mandate, identifying the unusual circumstances and to preserve "the interests of fairness", and to prevent possible injustice.

Additionally, in *Malik v. Brown*, 65 F.3d 148, 1995 U.S. App. LEXIS 25258 (9th Cir. 1995), the Ninth Circuit recalled its mandate when the court learned of the absence of information prior to its filing. Likewise, if you juxtapose *Brown* to this case at bar, a similarity can be drawn that at the time this Court made its filing, it was unaware of the Level adjustment that must occur.

2. TIMELINESS

Mr. Descent avers that he made a proper showing of "good cause" why this Court should entertain his motion past a one-year deadline after issuance of the mandate as promulgated in the Eleventh Circuit's Local Rule 41-1(c). Unfortunately, the Court did not take into consideration the Appellant's due "diligence" to properly exhaust all remedies available to him in the lower courts before turning back to the Appellate Court, which, in turn, was responsible for his unforeseeable lateness in this Court. Had the lower court resentenced Mr. Descent to a lower guideline level, this issue would be moot. The delays in the lower court by collaterally attacking his sentence precluded Mr. Descent from filing this Motion to Recall sooner. Based on this good reason for the delay in filing the motion, this Court should accept Mr. Descent's motion.

III. CONCLUSION

WHEREFORE, the Appellant, SERGES JACQUES DESCENT, requests this Honorable Court to grant the instant motion based on the foregoing facts and law, and enter an order granting same and any other relief this Court deems proper and just.

Respectfully submitted,

February 28, 2007
Coleman, Florida.

SERGES JACQUES DESCENT

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VERIFICATION

I SERGES JACQUES DESCENT, hereby verify and affirm that the foregoing facts and law are true and correct, done under penalties of perjury on this 28th day of February, 2007.

/s/ Serges Jacques Descent

SERGES JACQUES DESCENT

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(2)

No. 06-1527

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

SERGES JACQUES DESCENT
a.k.a. JACK DESCENT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR REHEARING

SERGES JACQUES DESCENT
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Petitioner

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S. Ct. Rule 44 1

PETITION FOR REHEARING

The Petitioner, SERGES JACQUES DESCENT (Mr. Descent), petitions this Court for a rehearing in this case following the final decision rendered on June 18, 2007, pursuant to S. Ct. Rule 44. This instant petition is timely filed and within the time limitations period set forth in S. Ct. Rule 44. This case presents a question of exceptional importance involving constitutional issues.

REASON FOR GRANTING PETITION FOR REHEARING

Mr. Descent seeks a rehearing on the question presented in the Final appeal – a question dealing head-on with the issue of the Eleventh Circuit Court of Appeals promulgating a local rule [41-(c)] which places a one-year time limit to recall a mandate unless the movant first establishes "good cause" for the delay in filing motion.

The question presented here is simply one of law; can the Eleventh Circuit Court of Appeals create a local rule that *limits the tendering of a motion to "recall a Mandate" filed more than a year after issuance of a mandate unless the Movant First establish "good cause" for the delay in filing the motion*. Mr. Descent respectfully submits that the answer to this standing question must be answered in the negative; that is, the enactment of Eleventh Circuit Rule 41-1(c) on its face is repugnant to this Court's General Provision as promulgated in Federal Rules of Appellate Procedure Rule 47(a)(2). This question is of exceptional importance as this Court is the sole Authority of the Federal Rules of Appellate Procedure. This Court has always supported any infractions of these rules, and to allow the

Eleventh Circuit's local rule to stand would create such an infraction.

Federal Rules of Appellate Procedure 47(a)(2) governs Local Rules by Courts of Appeals and states that "[a] local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a non willful failure to comply with the requirement." Applying this Rule to the Eleventh Circuits L.R. 41-1(c) unveils the fact by imposing a one-year time limitation forces a defendant to lose his Constitutional right to Due Process.

Additionally. "the right of access to the courts is founded in the due process clause and assures that no person will be denied the opportunity to present to the judiciary, allegations concerning violations of fundamental constitutional rights". *Wolf v. McDonnell*, 418 U.S. 539, 41 L. Ed.. 2d 935, 94 S. Ct. 2963 (1974), at 941.

Specifying a time limitation is not only in conflict with this Court's promulgation in F.R.A.P. 47(a)(2) but is contrary to the remaining sister circuits as well. The Second Circuit held in *Fine v. Bellefonte*, 758 F.2d 50 (2nd Cir. 1985) that "a motion to recall or modify the mandate may be made at any time". (quoting 2 Cr. R. 27(c)). It has been long held that "courts of appeals have asserted the power (analogous to that conferred on the district courts by Fed. R. Civ. P. 60(b) to recall a mandate, in effect reopening the case, without limit of time, although only in exceptional circumstances". *Johnson v. Bechtel Associates Professional Corp.*, 255 U.S. App. D.C. 198, 801 F.2d 412, 416 (D.C. Cir. 1986); 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, Section 3938 (1977). "*Patterson v. Crabb*, 904 F.2d 1179 (7th Cir 1990)".

> "[C]ourts of appeals", as Judge Posners has explained, "have asserted the power . . . to recall a

> mandate, in effect reopening the case, without limit of time, although only in exceptional circumstances." *Patterson v. Haskins*, 460 F.3d 645 (6th Cir. 2006); see also *United States v. Saikaly*, 424 F.3d 514, 517 (6th Cir. 2005).

MOREOVER, it is equally important to add that since the Eleventh Circuits' Local Rule 41-1(c) has no history, it would be safe to conclude that this Rule was created when the Eleventh Circuit split from the Fifth Circuit on September 30, 1981. At that time, the Federal Rules of Appellate Procedure 47(a)(2) was non-existent as it did not appear until it was promulgated in the 1995 Amendments. Naturally, between 1981 and until 1995 Amendments there was no reason to challenge this rule. However, since 1995, the Eleventh Circuits Rule stands in conflict with F.R.A.P. 47(a)(2), thus a violation of the Due Process Clause of the Fifth Amendment to the Constitution.

CONCLUSION

For the foregoing reason, the instant Petition for Rehearing should be granted, declare the Eleventh Circuit Rule 41-1(c) unconstitutional, and the Appellate Court recall its mandate so that Petitioner may be re-sentenced consistent with the new forfeiture amount.

Respectfully submitted,

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Petitioner

CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. The Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

SERGES JACQUES DESCENT